STATE OF MICHIGAN

COURT OF APPEALS

KIM MCFADDEN, as Next Friend for MARSHON MCFADDEN and MARCEL MCFADDEN, Minors, ANDREA BEARD, as Next Friend for DELPRIS BEARD, a Minor, ALBERT ASHE and ANNETTE ASHE, as Co-Next Friends for MARCUS ASHE, a Minor, and MICHAEL BURTON, as Next Friend for TYREE BURTON, a Minor,

Plaintiffs-Appellants,

v

WAL-MART STORES EAST, L.P., KIMBERLY A. SEIDENSTUCKER, and CANDACE SIMPSON,

Defendants-Appellees.

UNPUBLISHED
January 20, 2011

No. 293306
Eaton Circuit Court
LC No. 08-000119-NZ

Before: METER, P.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

In this suit for assault and battery, false arrest and imprisonment, intentional infliction of emotional distress, negligence, denial of equal public accommodations, MCL 750.147, and violation of the Civil Rights Act (CRA), MCL 37.2101 *et seq*., plaintiffs appeal as of right the trial court's order dismissing their claims under MCR 2.116(C)(10). Because we conclude that there were no errors warranting relief, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

In March 2007, the Wal-Mart store in Delta Township was undergoing renovations, which temporarily compromised several of the store's alarms and security systems. As a result, the store had recently experienced an increase in losses from theft, including the theft of two laptop computers earlier in the day at issue. During the evening, the five minor plaintiffs entered the store and divided into smaller groups. Although no one reported seeing them attempting to steal any merchandise, defendants Kimberley Seidenstucker and Candace Simpson, who were assistant managers in the store, became concerned that plaintiffs' activities fit the pattern of recent shoplifting incidents. Therefore, they decided to implement a store procedure known as

"aggressive hospitality," which is intended to discourage shoplifting by making store personnel highly visible and active in the presence of suspected shoplifters. According to defendants, plaintiffs responded negatively when staff members approached them to offer assistance. Plaintiffs cursed at the staff members, walked away and demanded that the staff leave them alone. Darius Burton, a Wal-Mart employee on duty that day and cousin to four of the minor plaintiffs, warned plaintiffs that they were being watched and asked them if they intended to steal. One of the plaintiffs denied planning to steal and told Darius Burton that he would "fire on" any employee who approached him. Although all five plaintiffs denied making that statement, plaintiff Marcus Ashe admitted that he heard the statement.

Seidenstucker and Simpson decided to call the police. Seidenstucker informed the operator about the recent shoplifting incidents and reported that plaintiffs' activity appeared to fit the pattern of previous thefts. Deputy Casey Tietsort and other officers responded to the call. Simpson and Seidenstucker informed him of the "fire on" remark, which they had interpreted as a threat of gun violence. Darius Burton told Tietsort that the phrase "fire on" meant to hit someone, not to shoot them. The officers conducted pat-down searches of the five minor plaintiffs, but did not find guns or stolen merchandise. The deputies then escorted plaintiffs outside the store.

Plaintiffs, who are African-American, sued defendants through their next friends. They alleged claims for racial discrimination in the provision of public accommodations, contrary to the CRA and MCL 750.147. They also asserted claims for assault and battery, false arrest and imprisonment, intentional infliction of emotional distress, and negligence. The trial court dismissed all plaintiffs' claims on defendants' motion for summary disposition under MCR 2.116(C)(10) and later denied plaintiffs' motion for reconsideration. This appeal followed.

II. SUMMARY DISPOSITION

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Meridian Twp v Ingham Co Clerk*, 285 Mich App 581, 586; 777 NW2d 452 (2009). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a complaint and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Driver v Naini*, 287 Mich App 339, 344; 788 NW2d 848 (2010). In reviewing a motion under MCR 2.116(C)(10), a court must consider the evidence submitted by the parties in a light most favorable to the nonmoving party to determine whether there is a genuine issue regarding any material fact. *Meridian Twp*, 285 Mich App at 586.

Initially, there is no merit to plaintiffs' claim that the trial court violated MCR 2.504(B)(2) and MCR 2.517(A)(1) by failing to make findings of fact on the record in support of its decision. Those rules do not apply to motions for summary disposition. MCR 2.517(A)(4). And it is well-settled that a court may not assess the credibility of the witnesses or resolve questions of fact in reviewing a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Rather, the court's task is to determine only whether there is a genuine issue of fact for trial.

A. PLAINTIFFS' STATUTORY CLAIMS

The CRA prohibits any person from "deny[ing] an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service" because of race. MCL 37.2302(a). Defendants' business is a place of public accommodation within the meaning of MCL 37.2302(a). MCL 37.2301(a). To establish a prima facie case of intentional discrimination under § 302, a plaintiff must establish four elements: "(1) discrimination based on a protected characteristic, (2) by a person, (3) resulting in the denial of the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations (4) of a place of public accommodation." *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007). The essence of a claim under § 302 is that the plaintiff was treated differently based solely on his or her membership in a protected class. See *Schellenberg v Rochester Mich Lodge No 2225 of the Benevolent & Protective Order of Elks of USA*, 228 Mich App 20, 33; 577 NW2d 163 (1998).

In this case, there is no direct evidence of unlawful discrimination. See *Harrison v Olde Fin Corp*, 225 Mich App 601, 609; 572 NW2d 679 (1997). Accordingly, plaintiffs had to establish their claims under the burden-shifting approach. Under that approach, the plaintiff must present evidence of intentional discrimination or disparate treatment. The burden then shifts to the defendant to show that he or she had a legitimate reason for his or her actions. If the defendant presents evidence of a legitimate reason for his or her actions, the plaintiff then has the burden of coming forth with evidence that the proffered reason is merely a pretext. See *Clarke v K Mart Corp*, 197 Mich App 541, 545; 495 NW2d 820 (1992); see also *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 133-134; 666 NW2d 186 (2003); *Hazle v Ford Motor Co.*, 464 Mich 456, 462; 628 NW2d 515 (2001).

Plaintiffs contend that defendants' implementation of the "aggressive hospitality" procedure and their decision to contact the police to report suspected criminal activity was racially motivated. However, defendants countered plaintiffs' evidence with evidence of legitimate, nondiscriminatory reasons for their decisions. Specifically, defendants presented evidence that there were heightened concerns about store security in light of the compromises to the store's security system during the renovation period and the recent increase in merchandise theft, and further, that plaintiffs' pattern of activity within the store on the evening in question was consistent with that associated with recent incidents of theft. Plaintiffs failed to present evidence to show that defendants' security concerns were not legitimate, or were not the real reasons for their decisions to implement the "aggressive hospitality" procedure or to contact the police. Thus, defendants were entitled to summary disposition of plaintiffs' statutory claims for discrimination.

We disagree with plaintiffs' argument that the trial court improperly resolved a disputed issue of fact by stating that one of the plaintiffs used the expression "fire on" in the presence of a Wal-Mart employee. Although the person who made that statement was never identified, and each of the five minor plaintiffs denied making the statement, plaintiff Ashe admitted hearing one of the other plaintiffs use that expression. Further, Seidenstucker testified that Darius Burton repeated the "fire on" statement to her after the police had arrived or were on the way, and he testified that he reported the remark to the assistant managers. He also included the remark in his written statement to the police. Even if there was a question of fact concerning who made the

statement, there was no question of fact that defendants Seidenstucker and Simpson received a report that one of the plaintiffs made it.

The trial court did not err in granting defendants' motion for summary disposition with respect to plaintiffs' statutory claims premised on unlawful discrimination.

B. ASSAULT AND BATTERY

Plaintiffs argue that the trial court erred in dismissing their claim for assault and battery because, although defendants did not personally commit an assault or battery, and although the police may have been justified in conducting a pat-down search based on the information they received from defendants, the evidence showed that defendants falsely informed Deputy Tietsort that plaintiffs had a weapon or had threatened to shoot anyone who approached them. Accordingly, plaintiffs argue, it was defendants' conduct that led to the offensive touchings of plaintiffs against their will.

In *Lewis v Farmer Jack Div, Inc*, 415 Mich 212; 327 NW2d 893 (1982), our Supreme Court rejected a similar argument in the context of a claim for false arrest. In *Lewis*, an employee of the defendant supermarket mistakenly identified the plaintiff as a person who had committed an armed robbery in another store five months earlier. The employee and store manager contacted the police, who arrested the plaintiff based on the employee's identification. After the police determined that the employee was mistaken in her identification, the plaintiff brought an action against the defendant supermarket for false arrest. *Id.* at 217. The Supreme Court held that no false arrest was committed because, "looking at the arrest from the point of view of whether the police, who made the arrest, had the legal right or justification to act as they did, the arrest was legal and justified and was not a false arrest." *Id.* at 218. In addressing the plaintiff's contention that the defendant could be liable because the employee "instigated the arrest" by identifying the plaintiff as the robber, the Court concluded that the defendant's agents did nothing more than provide information, and that the "police acted on and in the exercise of their own judgment and not at the direction of" the defendant's employees. *Id.* at 218-219. In a footnote, the Court quoted 1 Restatement Torts, 2d, § 45A, comment c, p 70:

> It is not enough for instigation that the actor has given information to the police about the commission of a crime, or has accused the other of committing it, so long as he leaves to the police the decision as to what shall be done about any arrest, without persuading or influencing them. [*Lewis*, 415 Mich at 219 n 3.]

Similarly, the evidence in this case showed that defendants merely provided information to the police and then left it to them to act on that information in their own discretion. There is no evidence that defendants urged the police to employ physical force against any plaintiff or deliberately misled the officers to influence them to do so. Plaintiffs attempt to minimize the significance of the "fire on" statement by emphasizing that Darius Burton had advised defendants that the phrase was slang for hitting someone, not shooting them. However, there was undisputed evidence that Burton's understanding of this phrase was conveyed to Deputy Tietsort, thereby leaving it to him to determine what type of police response, if any, might be warranted.

Under these circumstances, the trial court properly determined that there was no genuine issue of material fact in support of plaintiffs' claim for assault and battery.

C. FALSE ARREST AND FALSE IMPRISONMENT

Plaintiffs also argue that the trial court erred in dismissing their claim for false imprisonment and false arrest.[1] They argue that the trial court committed an error of law in concluding that there could be no false arrest if defendants acted in good faith, and improperly resolved a disputed issue of fact in finding that defendants acted in good faith. Plaintiffs contend that good faith is relevant only where a governmental defendant claims governmental immunity. Plaintiffs also argue that the trial court erroneously found that defendants did not act without legal justification or probable cause to intentionally cause plaintiffs' arrest.

Plaintiffs' assertion that a private actor can be held liable for a wrongful arrest regardless of the actor's good faith is erroneous. Plaintiffs rely on a statement in Justice WILLIAMS'S dissenting opinion in *Lewis*, 415 Mich at 234, in which he remarked that "it is possible that an arrest could be adjudicated lawful as between the arrestee and the police, yet a private citizen, acting through the police without legal justification, would be subject to liability for false arrest." Apart from the fact that this statement was made in a dissenting opinion, plaintiffs misinterpret the statement as authority for the proposition that a private citizen can be held liable for false arrest for innocently reporting incorrect information that results in an arrest. Plaintiffs' argument, taken to its logical conclusion, would impose on private citizens who contact the police the same probable cause standard that restrain police officers in effecting an arrest.

As previously explained in the analysis of plaintiffs' assault and battery claim, the evidence showed that defendants merely provided information to the police and left it to them to decide how to act on that information. There was no evidence that defendants requested that the police arrest or detain plaintiffs, or deliberately misled the officers to influence them to do so. Accordingly, there was no genuine issue of fact with respect to plaintiffs' claim for false arrest or imprisonment, and the trial court properly dismissed that claim. *Lewis*, 415 Mich at 221-222.

D. NEGLIGENCE

Plaintiffs also argue that the trial court erred in dismissing their negligence claim. A negligence claim requires that a plaintiff prove the following elements: (1) a duty owed to the plaintiff by the defendant, (2) a breach of that duty, (3) causation, and (4) damages." *Bialick v Megan Mary, Inc*, 286 Mich App 359, 362; 780 NW2d 599 (2009). Here, plaintiffs do not clearly identify a duty of care that was breached. They seem to suggest that defendants acted

---

[1] False imprisonment is an unlawful restraint on a person's liberty or freedom of movement. False arrest is an illegal or unjustified arrest, and the guilt or innocence of the person arrested is irrelevant. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 17-18; 672 NW2d 351 (2003). Although the terms are technically distinguishable, a false arrest necessarily involves false imprisonment. *Id.* at 17 n 15.

negligently by calling the police when it was not necessary to do so to protect other invitees in the store. They rely on case law addressing a business owner's duty to protect third parties from criminal harm on the business premises, and cite the principle that an invitor should not be expected to assume that others will disobey the law. *MacDonald v PKT, Inc*, 464 Mich 322, 335; 628 NW2d 33 (2001). However, this case does not involve a claim that defendants failed to protect plaintiffs from known criminal activity by third parties. The pertinent question here is not whether defendants might have been liable to a third party if they had failed to call the police and plaintiffs committed a violent act, but whether defendants breached a duty of care to plaintiffs. To the extent plaintiffs suggest that defendants had a duty to protect them from unreasonable interference by the police, as discussed previously, the evidence established that defendants merely notified the police of a perceived security concern and relied on the police to handle the situation. There is no basis for finding that defendants breached a duty of care to plaintiffs. Thus, the trial court did not err in dismissing plaintiffs' negligence claim.

III. MOTION FOR RECONSIDERATION

Plaintiffs also argue that the trial court erred in denying their motion for reconsideration. We review a trial court's ruling on a motion for reconsideration for an abuse of discretion. "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Corporan v Henton*, 282 Mich App 599, 605-606; 766 NW2d 903 (2009).

In order to warrant relief, the party seeking reconsideration "must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." MCR 2.119(F)(3). Here, plaintiffs failed to establish any palpable error that misled the court. As already discussed, the trial court properly dismissed plaintiffs' claims under MCR 2.116(C)(10); therefore, it did not abuse its discretion in denying plaintiffs' motion for reconsideration.

There were no errors warranting relief.

Affirmed. As the prevailing parties, defendants may tax costs. MCR 7.219(A).

/s/ Patrick M. Meter
/s/ Michael J. Kelly
/s/ Amy Ronayne Krause